IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 24TH NOVEMBER 2006 / 3RD AGRAHAYANA 1928

CRL.A.No. 1728 of 2005()

SC.608/2000 of ADDL. DISTRICT AND SESSIONS COURT (ADHOC), KOLLAM
CP.57/1999 of JUDICIAL.MAGISTRATE OF FIRST CLASS, PARAVOOR

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APPELLANT: 2ND ACCUSED.

MURALEEDHARAN, S/O.PADMANABHAN,
PANATE PADINJATTATHIL VEEDU, KADAMBANAD VILLAGE,
ADOOR TALUK.

BY ADVS. SRI.C.C.ABRAHAM
SRI.DILEEP P.PILLAI
SRI.B.N.HASKAR

RESPONDENTS: COMPLAINANT AND STATE.

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1. S.I.OF POLICE, CHATHANOOR,
KOLLAM.

2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.A.NO.16202 OF 2005 IN CRL.APPEAL NO.1728 OF 2005

DISMISSED

24.11.2006 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 1728 OF 2005

Dated this the 24th day of November, 2006

JUDGMENT

The appellant is the second accused in S.C.No.608 of 2000 on the file of the Additional District and Sessions Court (Ad hoc) Court No.I, Kollam. He faced trial along with the first accused for the offence punishable under Section 55(a) and (i) of the Abkari Act.

2. The prosecution case is that on 14.2.1999 at about 4 p.m. when PW.3, the Sub Inspector of Police, along with PW.2 and other police constables reached Toddy shop No.90 at Pallimon cheri, the first accused was found keeping possession of 12 litres of arrack mixed with toddy for sale and on enquiry it was revealed that the appellant was the licensee of the shop. PW.3 conducted a search and found 50 bottles containing 200 ml. of arrack and 20 bottles containing 100 ml. arrack in the store room of the toddy shop. The arrack contained in two bottles of 200 ml. and in one bottle of 100 ml. were taken as samples in one bottle of 750 ml. capacity. The remaining 48 bottles containing 200 ml. of arrack and 19 bottles containing 100 ml. of arrack along with the three empty bottles and the

boxes in which they were kept were seized as per Ext.P1 mahazar in the presence of the first accused and PWs.1 and 2. The first accused was arrested on the spot and the appellant who was absconding was later arrested and produced before the Judicial First Class Magistrate's Court on 19.9.2000. The sample taken from the contraband articles was sent for chemical analysis. Ext.P6 is the chemical analysis report which shows that the sample contained 26.02% by volume of ethyl alcohol. On the above allegations, the appellant and the first accused faced trial. To prove the case against the appellant and the first accused, the prosecution examined PWs.1 to 4 and produced Exts.P1 to P8 as well as MOs.I to III. No oral or documentary evidence was adduced on the side of the defence. After closing the prosecution evidence, the appellant and the first accused were questioned under Section 313 Cr.P.C. and they denied commission of any offence as alleged by the prosecution and stated that they were falsely implicated by the police. After considering the oral and documentary evidence adduced by the prosecution, the trial court found the first accused guilty under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for a term of one year and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months. The appellant was found guilty under Section 55(i) of the Abkari Act. He was

convicted thereunder and sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.2,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of two years. The above conviction and sentence ordered against the appellant is challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant submits that the trial court went wrong in accepting the evidence of PWs.2 to 4 without the support of any independent witnesses as the only witness who attested Ext.P1 mahazar turned hostile to the prosecution. Counsel further submits that the prosecution miserably failed to prove that the first accused was an employee of the appellant so that the conviction and sentence ordered against the appellant can be justified under Section 64 of the Abkari Act. Another contention taken up by the learned counsel for the appellant is that PW.3 had violated the mandatory provisions of Section 36 of the Abkari Act and the provisions of the Excise Manual while conducting search, taking samples and producing the samples and the residue before the court as there occurred a delay of 14 days in producing the same before the court

after seizure. Counsel also submits that the trial court went wrong in accepting Ext.P8 proceedings of the Assistant Excise Commissioner for finding that the appellant was the licensee of Toddy shop No.90 as copy of the proceedings was not given to the appellant before trial and the same was produced before the court below only on an application filed by the Public Prosecutor after closing the prosecution evidence as well as questioning the accused under Section 313 Cr.P.C.

5. The learned public prosecutor submits that the trial court was justified in acting on the evidence of PWs.2 to 4 who had given evidence regarding the offence committed by the appellant and the first accused. The learned Public Prosecutor further submits that the trial court was right in placing relying on Ext.P8 for finding that the appellant was the licensee of the toddy shop. Further, the learned Public Prosecutor submits that PW.3 had complied with the provisions of the Abkari Act as well as the Excise Manual while conducting search, seizing the contraband articles, taking samples and producing the same before the court below.

6. As per the prosecution case, when PWs.2 and 3 reached the scene of occurrence on getting reliable information, the first accused was found keeping possession of 12 litres of arrack for sale. As per Ext.P8

proceedings, the appellant was the licensee of T.S.No.90 from where the contraband articles were seized. PW.3 had given evidence to the effect that the first accused when questioned stated that the liquid in the bottles was arrack mixed with toddy and that it was entrusted to him for sale. PW.3 stated before the court that he had made enquiries which revealed that the appellant was the licensee of the toddy shop and hence he filed Ext.P4 report including the name of the appellant as the second respondent. PW.2, the police constable who accompanied PW.3 gave evidence in tune with PW.3. PW.4 completed the investigation and laid the final charge against the appellant and the first accused.

7. This Court considered the evidence adduced by the prosecution and the contentions raised by either side. It is seen that when PW.3 was examined by the defence counsel with regard to the contractor of the toddy shop, he had stated that the name of the appellant was not seen on the board kept in the toddy shop. Further, the first accused when questioned by the prosecution never stated that the appellant was the licensee of the toddy shop. There is no evidence to show that the appellant was the licensee of the toddy shop except Ext.P8 which was produced before the court below after closing the entire evidence. Further, learned counsel for the appellant submits that copy of Ext.P8 was not given to the appellant

before producing the same before the court below. Even if it is accepted, for argument sake, that as per Ext.P8 the appellant was the licensee of the toddy shop, there is no evidence to show that the first accused was the employee of the appellant and that he was entrusted with the contraband articles for sale. The case put forward by the first accused was that he was engaged in selling curry in the toddy shop during the relevant time. There is no master and employee relationship between the appellant and the first accused. Hence, the prosecution failed to prove that the appellant was the licensee of the toddy shop. Hence, the conviction entered against the appellant cannot be justified under Section 64 of the Abkari Act.

8. Section 64 of the Abkari Act reads as follows:

> **Presumption as to commission of offence in certain cases:--** In prosecutions under section 55, section 55B, section 56A, section 57, section 58, section 58A, and section 58B it shall be presumed until the contrary is proved that the accused person has committed an offence under that section in respect of any liquor or intoxicating drug, or any still, utensil, implement or apparatus whatsoever for the manufacture of liquor other than toddy or of any intoxicating drug or any such materials as are ordinarily used in the manufacture of liquor or of any intoxicating drug of the possession of which he is unable to account satisfactorily;

> and the holder of a license or permit under this Act shall be punishable, as well as the actual offender, for any offence committed by any person in his employ and acting on his behalf under section 8 or section 55 or section 55 B or section 56 or 56 A or section 57 or section 58 or section 58 A or section 58 B as if he had himself committed the same, unless he shall establish that all due and reasonable precautions were exercised by him to prevent the commission of such offence."

A reading of the second part of Section 64 of the Abkari Act would clearly indicate that the holder of a license or permit under the Abkari Act can also be punished as the actual offender for any offence committed by any person in his employment. Hence, it is the duty of the prosecution to prove that the alleged offence was committed by the employee and only then can the employer be roped in under the above provision. Since the prosecution failed to establish that the first accused was an employee of the appellant, the conviction against the appellant will not stand.

9. The next question to be considered is whether PW.3 and the other officials failed to comply with the provisions of Section 36 of the Abkari Act and the Excise Manual. The crime was detected on 14.2.1999. As per Ext.P3 property list, the sample, residue and the other material objects were kept in the police station and were produced before the

court below only on 1.3.1999 . Hence, there occurred a delay of 14 days in producing the contraband articles and other material objects before the court below. In this context, this Court is of the view that only because of the delay in producing the material objects before the court below, the prosecution case cannot be brushed aside. But, neither PW.3 nor PW.2 had a case that the contraband articles and the other material objects were kept in tact till those items were produced before the court below. It is to be noted that in the decision reported in **Narayani v. Excise Inspector, 2002(3)K.L.T. 725,** this Court had taken the view that **"the prosecution has not proved that residue and sample were kept in the proper custody till those items were produced in court on 13.9.1995 and chance of tampering cannot be ruled out, benefit of doubt is to be given to the accused."** Further, in **Dominic v. State of Kerala, 1989 (1) K.L.T. 601,** this Court had taken the view that **"when S.36 of the Abkari Act and paragraphs 17, 26, 34, 49 and 77 in the Manual are read together, as they should be, it is clear that seizure should be reported to the Court 'forthwith', and request made for sending a sample for analysis."** Hence, this Court is of the view that the delay in producing the contraband articles and the other material objects before the court below is prejudicial to the appellant. It is also to be noted that the case put forward by the appellant was that he had no connection with the

commission of the offence as alleged by the prosecution. This Court has also taken into account the fact that Ext.P8 relied on by the trial court was produced through the Public Prosecutor after closing the entire evidence and after questioning the appellant under Section 313 Cr.P.C. and that too without giving a copy of Ext.P8 to the appellant as contemplated under Section 207 Cr.P.C.

10. In the above circumstances, this Court is of the view that the appellant is entitled to the benefit of doubt. Hence, the conviction and sentence ordered against the appellant - second accused in S.C.No.608 of 2000 on the file of the Additional District and Sessions (Ad hoc) Court No.I, Kollam are set aside and the appellant is acquitted. The appellant shall be released forthwith, if he is not wanted in connection with any other case.

The Crl. Appeal is allowed as above.

(K.THANKAPPAN, JUDGE)

sp/

C.R.

K.THANKAPPAN, J.

CRL.A. NO.1728/2005

JUDGMENT

24TH NOVEMBER, 2006